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No. 82-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students, MARIANNE SICKAFUSE, KENNETH J. HOCKENBERRY, JENNIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T.H. BELL, Secretary of U.S. Department of Education, HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF WABASH COLLEGE AS AMICUS CURIAE

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Wabash College respectfully submits this Brief as *amicus curiae* in support of the Petitioners, filed upon the

written consent of the parties in accordance with Rule 36.2 of the Rules of this Court.*

INTEREST OF AMICUS CURIAE

Wabash College is a small, private, independent, non-profit institution of higher education located in Crawfordsville, Indiana. Since its founding in 1832, the College has maintained its independence from the institutions of government. The College has been and is now privately-funded and endowed, and it has every intention of continuing to achieve its educational purposes without seeking federal or state assistance.

Since 1832, Wabash College has also sought to maintain an academic environment free of any restraints on position, discourse, dialogue, or debate. The College views its ultimate function as the nurturing and growth of young minds, through guidance and challenge. To assure the realization of that goal the College allows its faculty to play a dominant role in the administration of the College, including matters that reach far beyond curriculum and course content, and maintains a student-faculty ratio of approximately 10 to 1. The College's singular goal is the creation of the best possible environment for teaching and learning.

At first blush, the College most logically might seem to be disinterested in this litigation, for as an historically all-male institution (since 1832) it would be by-and-large exempt from coverage under Title IX even if it did seek federal funding for one of its programs. *See* 20 U.S.C. §1681(a)(5). Yet Wabash College shares with co-educational colleges like Grove City College a status as critical to the educational processes of our Nation as it is unique. Wabash College, like Grove City College and other similar institutions, is *small, private* and *independent.* Like

* Written consents from counsel for the Petitioners and for the Respondent have been filed with the Clerk of this Court.

them, Wabash offers an alternative to educational institutions which either are administered by the government or have adopted postures so intertwined with the government as to create a relationship of dependency. Like Grove City College, Wabash College views as its perpetual duty the maintenance of a uniquely private educational forum harboring the active exercise of academic freedom. And like Grove City College, Wabash College views with alarm any unwarranted governmental or other presence, intervening frontally or by more invidiously tiny steps over time, which will compromise its independence.

Wabash College feels an obligation to speak out when it sees an attempt to compromise the independence of a sister institution by an unwarranted regulatory presence which simultaneously overreaches its statutory boundaries and treads upon constitutionally-guarded ground. That is why it writes, respectfully, to this Court.

SUMMARY OF ARGUMENT

The impropriety of the position of the Department of Education (hereinafter "DOE") in this case may be stated simply: operating in an area of constitutional sensitivity against a statutory scheme that expressly limits it to program-specific actions, DOE is attempting to use governmental payments to individual students as the premise for regulating the entirety of a private, independent institution of higher education which itself seeks no federal funds. Upon no (or the most tenuous) connections DOE would premise the utmost breadth of intervention and control. Such an operating principle for agency action cannot be sustained.

There is no doubt that the Constitution is sensitive to governmental intrusion upon the academic environment. This principle is reflected in the specific concepts of the individual rights of faculty and students, including First Amendment rights of free speech and association and Fifth

Amendment rights to liberty (including the liberty of free choice of educational institutions); in the corollary principles of academic freedom and institutional autonomy which are necessary to protect such individual freedoms; in the simple concept of privacy; and in the protection of these rights through the freedom of the entire university community. In each and all of these the Constitution clearly requires caution and explicit Congressional sanction, not regulatory excess, before a federal agency may tread onto the Nation's private campuses.

In the face of these concerns, and even acknowledging the admittedly legitimate purpose of using the federal purse to help eliminate the vestiges of prohibited sex discrimination at various levels of education, DOE bears the burden of justifying its total intervention into Grove City College through its use of funds received by individual students to support "institutional" application of Title IX and its regulations to Grove City. That burden is particularly high where, as here, DOE's desire to regulate the entire institution is so starkly contrary to the central, program-specific concept of its enabling legislation. DOE cannot sustain that burden:

First, the language and history of Title IX do not evidence Congress' affirmative intention, clearly expressed, that DOE regulate an entire educational institution merely because some of its students receive federal funds for use during their college years. To the contrary, the language of Title IX is expressly program-specific, not institution-wide. Even if one looks beyond the explicit language of the statute to the legislative history of Title IX, that history in fact supports its limited, program-specific language.

Second, DOE's interpretation ignores the fact that Title IX is by definition not an exhaustive effort to regulate educational institutions.

Third, DOE's interpretation of the statute in an effort to maximize its regulatory scope is illogical. Beginning at the

middle point of coverage of individuals under a program or activity, which program or activity directly receives federal funds, DOE uses a jurisdictional premise so restricted as to be nonexistent—the receipt by individual students of funds which may be spent outside the College—to justify an intervention—asserted authority to apply the regulations to the entire institution--so broad as to be unlimited. Such a regulatory scheme also has the absurd result of subjecting institutions whose programs participate directly in federal largesse to less intervention than those whose programs do not. And DOE's "remedy" under its interpretation affects first and foremost innocent parties—the students whom the funds are intended to assist.

Finally, other, less invidious alternatives are available to prevent sex discrimination in education. Both state and other federal laws exist to prohibit sex discrimination in education. If an educational institution chooses to be the conduit for distribution of federal funds to its students on their admission, that program of distribution may be viewed as the "program" for purposes of Title IX. Such a program-specific application would protect the government's legitimate interest in seeing that the funds are not distributed on the basis of sex while at the same time avoiding unwarranted total intervention into the institution. Should DOE desire to seek broader authority to intervene, it should at least be required to take the matter back to Congress for Congress' affirmative intent, clearly expressed, that such broad intervention is necessary to achieve the legislative purpose.

DOE simultaneously steps off of its statutory foundation and onto constitutionally sensitive ground. Such a combination of excesses cannot be tolerated.

ARGUMENT[1]

I.
PRIVATE HIGHER EDUCATION IS AN AREA OF CONSTITUTIONAL SENSITIVITY

A. Constitutional Sensitivity Is Required In Light of The Rights Created By Various Amendments

This Court has long recognized that our colleges and universities play a critical role in preserving and perpetuating liberty and freedom in the Nation. In *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957), the Court found an invasion of liberties "in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread," and declared:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and mistrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

This principle from the plurality opinion of the necessary freedom of colleges and universities was echoed even more forcefully by Mr. Justice Frankfurter and Mr. Justice Harlan in their concurrence:

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[1] Wabash College agrees generally with the positions taken by Grove City College in its Brief to this Court. In the interests of time, so precious to the Court, Wabash will not belabor this Brief by restating Grove City's arguments here.

> These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensible for fruitful academic labor.

354 U.S. at 262.[2]

In *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967), the majority reiterated the critical importance of diversity and freedom in higher education:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through

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[2] Mr. Justice Frankfurter also quoted with approval the following statement of the four essential freedoms of a college or university:

> 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine *for itself* on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'

354 U.S., at 263 (Emphasis added). It takes little effort to see that DOE's regulations do intervene into these areas of essential freedom by establishing regulatory review of decisions regarding employment (34 C.F.R. §86.51 *et seq.*), access to course offerings (34 C.F.R. §86.34), institutional attitudes toward marital status and pre- or extra-marital sex (34 C.F.R. §86.40), allocation of housing and other financial resources (34 C.F.R. §86.32), and admissions (34 C.F.R. §86.21-.23).

> wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' (Citations omitted.)[3]

Of course where, as in Grove City's case, the members of the college community are brought together by common beliefs, including common religious pursuits, they are protected by constitutional concern not only for academic freedom but also for freedom of association. As stated in *N.A.A.C.P. v. Button*, 371 U.S. 415, 430 (1963):

> We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record....subserve such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right 'to engage in association for the advancement of beliefs and ideas.' NAACP v. Alabama, ex rel. Patterson [357 U.S. 449, 460 (1958)].

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[3] Mr. Justice Powell has recently echoed this perception that, in education as elsewhere, freedom is perpetuated not through authoritative or orthodox action but through the tension of diversity. Quoting from both *Sweezy* and *Keyishian*, Mr. Justice Powell stated that attainment of a diverse student body

> clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.***
>
> ***As the Court noted in *Keyishian*, it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples.
>
> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment.

Regents of the University of California v. Bakke, 438 U.S. 265, 312-14 (1978).

These constitutional concerns are not limited to the college and its faculty. The freedom to choose which school to attend is a part of the student's "liberty" protected by the Fifth Amendment. In striking down a statute requiring that parents and students submit solely to the public view of education, because it "unreasonbly interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control," this Court stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Society of the Sisters, etc., 268 U.S. 510, 534-35 (1925).

Another constitutional pillar to the freedom of the academic environment is the concept of privacy. As Mr. Justice Douglas, delivering the opinion of the Court, noted in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), "[t]he First Amendment has a penumbra where privacy is protected from governmental intrusion." The peculiar education created by the relationships among and constitutional rights of the students, faculty and administrators within a private college is worthy of constitutionally-sanctioned privacy from unwarranted governmental intervention. Here, as in *Griswold*, it may be said that "[v]arious guarantees create zones of privacy," *id.* at 484, and "[t]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees," *id.* at 485.

Mr. Justice Goldberg's concurrence in *Griswold* (joined by Mr. Chief Justice Warren and Mr. Justice Brennan) found additional support for the right of privacy in the

Ninth Amendment.[4] Finding that the clear meaning of the Ninth Amendment is that the rights expressly enumerated in the Bill of Rights are not an exhaustive listing of the rights of the people, Mr. Justice Goldberg acknowledged the existence of the right of privacy:

> I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live."

381 U.S., at 494, quoting *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas J., dissenting). He then quoted Mr. Justice Brandeis' summary of the constitutional guarantee of privacy in his dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), *overruled, Katz v. United States*, 389 U.S. 347 (1967):

> "[The makers of our Constitution] conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

Id.

This Court also expressly has recognized that it is not merely the individuals but the entire university whose freedoms must be protected, for the freedoms of the individual members of the university community mean little if anything if the university itself is not free:

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[4] The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others *retained by the people*." (Emphasis added.) The Tenth Amendment also makes clear that what powers are not delegated to the Federal Government are retained by the States *and the people*: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." (Emphasis added.) Regardless of the perspective of a right to privacy retained by the people, under the Ninth Amendment, or the need for delegation of regulatory power by the people acting through Congress, under the Tenth Amendment, there is clearly a presumption that, where constitutional rights are implicated, the federal government's regulatory agencies may not fill unregulated gaps without Congressional authority. *See* the discussion *infra* at pp. 12-14.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By Pierce v. Society of Sisters, supra, the right to education one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By Meyer v. State of Nebraska, supra, the same dignity is given the right to study the German language in a private school. *In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes* not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (Martin v. City of Struthers, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313) and freedom of inquiry, freedom of thought, and freedom to teach (see Wieman v. Updegraff, 344 U.S. 183, 195 73 S.Ct. 215, 220, 97 L.Ed. 216)—indeed *the freedom of the entire university community.* Sweezy v. State of New Hampshire, 354 U.S. 234, 249-250, 261-263, 77 S.Ct. 1203, 1211, 1217-1218, 1 L.Ed2d 1311; Barenblatt v. United States, 360 U.S. 109, 112, 79 S.Ct. 1081, 1085, 3 L.Ed.2d 1115; Baggett v. Bullitt, 377 U.S. 360, 369, 84 S.Ct. 1316, 1321, 12 L.Ed.2d 377. *Without those peripheral rights the specific rights would be less secure.* And so we reaffirm the principle of the Pierce and Meyer cases.

Griswold v. Connecticut, 381 U.S. at 482-83 (emphasis added). Nowhere is the protection of the freedom of the institution from unwarranted external interference in order to protect the freedoms of its members—faculty and

students—more logical or justified than in the context of the small, private, independent college.[5]

B. Such Constitutional Sensitivity Requires That DOE Act Only With Caution And Explicit Congressional Sanction

This review of examples of the Court's prior recognition of constitutional sensitivities to governmental intrusion into the mix of rights inherent in the academic environment—be they based on expression, association, choice or privacy, in the individual context or as to "the freedom of the entire university community," *Griswold*, 381 U.S. at 482—demonstrates the Court's view that the processes of academic freedom operate most effectively when they are left alone. We make no claim that such rights constitute an absolute privilege against governmental intervention. What we do believe, however, is that these constitutional premises clearly require caution, not abandon, express Congressional sanction, not regulatory excess, when a federal agency seeks to extend its influence onto the Nation's campuses, particularly those of small, private, independent colleges.[6]

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[5] We believe that in the appropriate context a private institution of higher education may assert on its own behalf a constitutional right of free expression, association, liberty (of choice) or privacy, particularly where, as here, it acts on behalf of its college community vis-a-vis' the government. In the same way that the rights of private individuals occasionally must be protected from unwarranted intrusion by governmental institutions of education, so must the rights of private institutions of education occasionally be protected from unwarranted intrusion by the government. However, such a holding is not necessary to sustain the Petitioners' position in this case. As noted further below, the importance of these constitutional principles in this context is to require the government to act only with the affirmative intention of Congress, clearly expressed, and then only with precision and in the most narrow means possible; the "institutional" interpretation DOE has applied to Grove City fails all these tests.

[6] The *effect* of the government's intrusion on the academic environment of an institution will of necessity vary based on the size and nature of the

(Footnote continued on following page)

Even in the context of a "legitimate and substantial" purpose, when the government's action ventures into the realm of constitutional rights it must take the narrow path:

> There can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion. But 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'

Keyishian, 385 U.S. at 602, quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). As the Court there declared further, immediately after quoting from *Sweezy*, 354 U.S. at 250, that "[t]he essentiality of freedom in the community of American universities is almost self-evident":

> We emphasize once again that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' N.A.A.C.P. v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405; '[f]or standards of permissible statutory vagueness are strict in the area of free expression, too. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' Id., at 432-433, 83 S.Ct., at 337-338.

385 U.S. at 603-04.

Similarly, in *Sweezy*, the Court struck down action by a state attorney general because the action infringed on constitutional rights (including academic freedom) and was not based on the clear authority of the legislature. The Court first declared that

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(Footnote continued from previous page)

school. Agency presence or intervention which may be viewed as a mere cost of doing business for a 30,000 student state university, because it is diffused through administrative levels and is merely an addition to the existing burdens accepted by the faculty and students used to dealing with the university's own bureaucracy, may be viewed as a significant disruption to a small private college whose administration is chosen from and closely a part of the faculty.

> [i]t is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community.

354 U.S. at 245. Then, noting both that "*it cannot be stated authoritatively* that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated," *id.* at 253 (emphasis added), and that "[t]he lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority," *id.* at 254, the Court struck the actions as violating due process requirements.

The principle of requiring authoritative indications of a Congressional foundation for agency intervention into constitutionally sensitive areas has recently been reaffirmed in *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Citing a series of precedents,[7] the Court there held that because the exercise by the NLRB of jurisdiction over parochial schools would give rise to "serious constitutional questions," the Court had to identify "the affirmative intention of the Congress clearly expressed" before concluding that the NLRB's enabling legislation granted jurisdiction over the schools. *Id.* at 500-01. Notwithstanding that the National Labor Relations Act defined the Board's jurisdiction in very broad terms, and relying upon a provision of that Act which, like the program-specific provisions of Title IX, indicated a Congressional sensitivity to First Amendment issues, the Court found no such "affirmative intention of Congress clearly expressed" and denied the Board jurisdiction over the schools.

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[7] *See, e.g., McCulloch v. Sociedad Nacional de Marineras de Honduras*, 372 U.S. 10 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

II. DOE'S "INSTITUTIONAL" INTERPRETATION IS INVALID AS AN UNWARRANTED INTERVENTION

The ability of an agency of the federal government to regulate the entirety of a private, independent educational institution merely because some of its students receive federal funds raises "serious constitutional questions" about the proper foundation necessary for governmental presence and regulation in higher education. In light of the lack of any "affirmative intention of Congress clearly expressed," the patently non-exhaustive scope of the legislation, the illogic of the agency's interpretation, and the availability of other less invidious means to achieve regulatory purpose, DOE's "institutional" approach must fail.

A. Grove City Properly Raises This Issue Now

It cannot seriously be disputed that the government has a legitimate purpose in using the federal purse to help eliminate vestiges of prohibited sex discrimination at the various levels of education. And it certainly cannot be seriously claimed that the constitutional rights identified above create absolute walls against the exercise of legitimate governmental perogatives on the campus. What is clear, however, is that when such important constitutional concerns are implicated by governmental action in the academic arena, the propriety of the depth and breadth of the government's intervention must be viewed with a cautious and critical eye. "When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). What cautions apply to an elected Congress, which directly exercises the will of the people, apply with even greater force to an appointed government agency, which does not.

It is also not necessary, much less appropriate, that those affected by overbroad governmental intervention into private education wait until the agency strikes at the absolute core of the constitutional rights involved. That principle of total intervention across the breadth of the educational institution which DOE would have this Court allow to be established today because the depth of DOE's intervention is claimed to be shallow will still stand tomorrow when the agency inevitably seeks to probe deeper into the workings of the institution, to the heart of its freedoms. From the perspective of the private college, the first unwarranted step onto its toes is as fatal as the last into its heart, because the principle—that the agency may tread on the collegial body without clear Congressional authority—has been established. As Mr. Justice Frankfurter stated in his concurrence in *Sweezy*, after noting the "four essential freedoms" of the university:

> I do say that in these matters of the spirit inroads on legitimacy must be resisted at their incipiency. This kind of evil grows by what it is allowed to feed on. The admonition of this Court in another context is applicable here. 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.'

354 U.S. at 263-64 (quoting *Boyd v. United States*, 116 U.S. 616, 635).

B. DOE Cannot Satisfy Its Burden To Sustain its "Institutional" Interpretation

In this context, where constitutional considerations are implicated, it is the agency's burden to demonstrate that its desired intervention is justified, not only by the legitimacy of some ultimate statutory purpose but by the "affirmative intention of Congress clearly expressed." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. at 500-01. This is particularly so where its stated desire to regulate the entire breadth of

an educational institution is so starkly contrary to the central, program-specific concept of its enabling legislation. DOE's claim of pervasive jurisdiction cannot satisfy this burden.

1. DOE's Interpretation Is Contrary To The Program-Specificity of Title IX

The language of Title IX, 20 U.S.C. §1681-1686, is *program-specific* throughout its provisions. *See North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 1926 (1982). This Court there noted that the language of the statutory prohibition of §901(a), 20 U.S.C. §1681(a), and the statutory language in §902 authorizing DOE both to issue regulations and to terminate funds, 20 U.S.C. §1682, are program-specific and that the legislative history of Title IX "corroborates its *general* program specificity." *Id.* (emphasis added). The Court concluded:

> [A]n agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§901 and 902.

Id. Significantly, as the Court stated in *North Haven*, "Congress failed to adopt proposals that would have prohibited *all* discriminatory practices of an institution that receives federal funds." *Id.* Thus, there is evidence not only that Congress mandated DOE *to be* program-specific, but also that Congress implicity mandated DOE *not to be* institution-general. Yet that is precisely what DOE now claims to have the authority to do. In light of the program-specificity confirmed by *North Haven*, DOE's institution-wide application of the regulations can hardly be found to be supported by "the affirmative intention of Congress, clearly expressed."

If one looks past the ruling in *North Haven* and the language and particular legislative history of the program-specific requirements of Title IX, one still finds no such clear expression of affirmative intent. As Grove City discusses in detail in its Brief, there is substantial

legislative history that suggests that Grove City is not even a recipient of federal financial assistance. Even looking to the entirety of the legislative history (and ignoring Congress' refusal to adopt proposals reaching all practices of an institution receiving federal funds), it is at worst inconclusive as to DOE's claim of authority to regulate the entire institution. Such inconclusiveness does not "affirmative intention clearly expressed" make.

2. Title IX Is Not Exhaustive Legislation

DOE ignores that its statutory mandate does have limits. In enacting Title IX Congress did *not* attempt to regulate every educational institution in America. Title IX contains no general prohibition of sex discrimination in education. Implicit in this statement, in the program-specific language of Title IX itself, and in Congress' refusal to adopt proposals that would prohibit all discriminatory practices even of institutions that directly receive federal funds, is the conclusion that DOE, in its regulatory zeal, cannot ignore: there are areas of educational activity that Congress did not intend Title IX to reach.

Such a conclusion can hardly be said to frustrate DOE's regulatory purpose. Those few areas not so covered (including either institutions themselves, like Grove City College, or those portions of institutions which are not part of the program directly receiving federal funds)[8] are the exception to DOE's ability to make efforts to ensure compliance with Title IX in the thousands of primary and

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[8] *See, e.g., Hillsdale College v. Dept. of Education, et al.*, 696 F.2d 418 (6th Cir. 1982), *petition for cert. pending* (82-1538). Under the Sixth Circuit's theory in *Hillsdale*, Title IX itself might be applied to a disbursement program (but not the entire institution) of a college which chooses to be a conduit for distribution of federal funds to its students. Such a limited program-specific application of Title IX would protect the government's legitimate interest in seeing that the funds are not distributed on the basis of sex discrimination prohibited by Title IX but would avoid unwarranted total intervention in the educational institution. Because Grove City College does not even act as a conduit for the distribution of such funds, it would in any case lie wholly beyond the statute's reach.

secondary schools, public universities and many private institutions of higher education in this Nation. Its actions here lie not only outside its regulatory authority but also at the outermost fringe of its practical concern for results. Moreover, the gap left by Congress is not a void. Other laws, both state and federal, exist to redress discrimination in education. *See, e.g.*, 17 PA. CONS. STAT. ANN. §500, *et seq.* (Purdon 1981); IND. CODE ANN. 22-9-1-1 to -13; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 to -17.

3. DOE's Interpretation Is Illogical

DOE's interpretation of Title IX in an effort to maximize its regulatory domain is also illogical. DOE's enabling legislation clearly contemplates receipt of federal funds by an institution for use—assistance[9]—in a particular program or activity; the coverage of the statute (and DOE's regulatory authority) applies to treatment of individuals under the program or activity receiving federal funds. DOE's interpretation—that receipt by the individual student involves coverage of the entire college—jerks its jurisdictional premise and its desired regulatory intervention in opposite directions. DOE uses the most tenuous of jurisdictional premises, if any at all—the receipt by individual students of funds which may be spent on goods or services purchased from, or not from, the college, at their choice—to justify an intervention—asserted authority to apply its regulations to the entire college—so

[9] When the federal government provides a local school system with funds to assist it in providing services free of charge to the children of its constituents it is doing an act very different from providing an individual student with funds to assist her or him in buying services rendered (including not only from a college but also from housing sites, book stores and others unrelated to the college). In one case, the educational institution stands as the direct recipient of assistance; in the other, the student is the recipient and the educational institution stands only as one among many entities compensated for providing services to the student.

broad as to be unlimited. While DOE's jurisdictional foot slides right, its regulatory foot slides left; DOE cannot sustain such an illogical split.

Indeed, under the "logic" of DOE's interpretation institutions which seek no federal aid at all would suffer *more* intervention by DOE than those institutions which affirmatively seek direct federal aid and whose programs participate *directly* in federal largesse. If Grove City seeks a grant of funds to build a new music center, *only* that specific activity (and presumably the College's specific music programs) would be covered by Title IX and the regulations; other programs would not. But if Grove City seeks no federal funds but receives certain tuition payments from some students, part of which may be paid with assistance to the student from the federal government (even if in dollars orders of magnitude less than a building grant), *everything* Grove City does would be covered and subject to DOE's regulatory intervention. Such a result cannot have been intended by a Congress which affirmatively rejected legislative proposals to cover all practices of an institution receiving federal funds. *North Haven*, 102 S.Ct., at 1926.

Finally, as the Grove City case makes clear, DOE's "remedy" under its institution-wide theory affects first and foremost innocent parties—the students. In return for Grove City's simple refusal to permit DOE to extract an unauthorized commitment to institution-wide coverage in return for the ability of some of its students simultaneously to exercise their constitutional right to freedom of choice of an educational institution and their statutory right to receive federal aid, DOE would require the students to sacrifice either their constitutional right—to choose their educational institution—or their statutory right—to

receive federal aid to which they are otherwise entitled.[10] That this occurs in the context of a stipulation that Grove City does not engage in any discrimination prohibited by Title IX only makes DOE's desired result all the more obnoxious and repulsive.

4. Other Means Exist To Satisfy DOE's Goal

As noted above, other state and federal laws contain prohibitions of sex discrimination applicable to education. The Sixth Circuit's analysis in the *Hillsdale College* case would ensure nondiscriminatory distribution to the students of such funds as are actually received by the institution under such distribution program without unwarranted intervention into the rest of the entire institution. If, notwithstanding this other, less invidious interpretation, DOE desires further to broaden its authority to review educational affairs consistently with Title IX as it is now written, DOE can always attempt to utilize the procedure expressly established by §902, 20 U.S.C. §1682, for Congressional review and disapproval of regulations. And, of course, if DOE desires that the program-specific limitations which lie at the heart of Title IX be removed, it can ask Congress to pass legislation to do so. DOE nowhere considered any such alternative interpretation, nor did it seek to obtain Congress' "affirmative intention clearly expressed." Instead, DOE sought to expand its domain to the entire educational institution, without (indeed contrary to) Congressional authority and in disregard of the constitutionally-sensitive role of an educational forum free of unwarranted governmental presence. It cannot be permitted to do so.

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[10] In this sense neither Grove City nor its students have a truly voluntary choice to "forego" the funds received by the students, and DOE's interpretation clearly falls within the spectrum of "unconstitutional conditions" upon the exercise of statutory rights long prohibited by this Court. *Sherbert v. Verner*, 374 U.S. 398, 405-07 (1963); *Frost v. Railroad Comm. of State of California*, 271 U.S. 503, 593-94 (1926).

III.
CONCLUSION

We come then full circle to a clear view of the proper relationship between the admittedly legitimate purpose of Title IX, its inherently and expressly specific scope, and the constitutionally sensitive ground to which it is applied. The constitutional concerns implicated by governmental intervention into the realm of private higher education and the program-specific language of Title IX contain the same kernel of limitation on regulatory action. Even in the context of legitimate legislative purpose, Congress recognized that countervailing concerns formed a substantial additional reason for placing a boundary on governmental intervention into higher education. The program-specific language of Title IX constitutes the mechanism for establishing precisely that boundary. DOE's "institutional" approach to its regulation of Grove City College violates that boundary. It cannot be allowed to stand.

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